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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION
An Illinois Not-For-Profit Corporation

Petitioner

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Respondent

MEDUSA CORPORATION
NORTHWESTERN STATES PORTLAND CEMENT CO.

Intervenors

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent's brief seriously misstates the decisions of the court below, asserts those decisions are correct and that they do not conflict "with any decision of this Court." The record below does not support those statements and assertions. If Respondent's contentions were credited and the Writ denied:

> —Meaningful consideration of the cost of pollution control would be effectively removed from standard-setting under § 111 of the Clean Air Act on the basis of the decisions below which do not furnish adequate

judicial review under this Court's *Overton Park* decision. (401 U.S. 402 (1971)) Those decisions fail to state *any* affirmative finding that the Administrator adequately considered the cost as required by the statute.

—A mass emission standard would be permitted to stand despite the facts that it was amended by a process which blatantly violated two statutes, the court below refused to rule on this issue and the Solicitor General offers no rationale to support this result.

—Plume opacity would be validated as a standard when opacity does not reliably measure pollution and the degree of opacity cannot be gauged with a reasonable degree of accuracy. This would conflict with this Court's decision in *Addison* v. *Holly Hill,* 322 U.S. 607 (1944) and this Court's "conclusive presumption" decisions (Pet. 16) holding that administrative regulations must conform to controlling statutes.

—Sources of *less* pollution would be controlled *more* severely than those emitting a greater volume of the same pollutant despite the fact that total pollution would be reduced much more if this pattern of regulation were reversed. The present result is irrational, counter productive, unreasonable and constitutes regulatory discrimination in conflict with a long line of this Court's decisions the latest of which is *Richardson* v. *Belcher,* 404 U.S. 788 (1971).

—A regulation would be validated despite an administrative record which the court below never really found adequate. This result conflicts with this Court's decision in *Camp* v. *Pitts,* 411 U.S. 138 (1973).

Respondent's brief is merely a repetition of the conclusions of the Agency and the court below. It advances *no* persuasive rationale or other authority to support those conclusions and does *not* respond to contentions made during the administrative-judicial process and in the Petition as summarized above.

The disquieting aspect of this case is that the regulation has been permitted to remain effective on the basis of the Agency's representation that (in its unreviewable discretion) it *would not* prescribe standards requiring costs "grossly disportionate" to benefits[1] (A-61); it *will not* enforce the opacity standard as written (Pet. 18, A-79); and it *may* remove the discrimination between the particulate standards (A-3, A-63). Bureaucratic assurances that regulations which do not conform to the controlling statute will not be enforced and that those which violate constitutional principles may be changed offend the Rule of Law and are not acceptable alternatives to setting aside the invalid regulations.

The Writ should issue to affirm constitutional and legislative principles which have not been respected by the Agency or the court below.

THE COST OF ACHIEVING POLLUTION REDUCTION

The "extensive economic analysis" referred to by the Solicitor General was never found by the court below to be an adequate consideration of cost as required by the statute. On first hearing the court pointedly avoided such a finding stating only that "the Administrator has obviously given some consideration to economic costs." (A-29) This cost study was not specified for consideration on remand. Thus, the later *non*-finding that "we find no reason to disagree with the Administrator's disposition of the remand"[2]

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[1] This assurance is not credible when, in this case, it has prescribed a standard requiring a disproportion of more than 100 to 1. (Pet. 6)

[2] Judge Leventhal, who wrote the remand opinion and heard oral argument following remand, did not participate in this finding. (A-1)

(A-4) did not touch on the adequacy of the study to satisfy the statute.

This "analysis" was such a sham that it was virtually abandoned during remand. It consisted of a 1971 report by staff economists based on earlier data. Assuming a "model" plant with less than one-half the expected capacity of future plants[3], the cost of building and operating future plants which could meet the standards was estimated. The estimate was based on predicted future interest rates and fuel costs[4] and, therefore, became a parody when the Arabs cut off the U.S. oil supply and these rates and costs skyrocketed. No consideration was given to the ability of the industry to secure the necessary capital although the EPA now says it will evaluate this factor in future standard-setting.

The transparency of this specious exercise was revealed during remand when the Agency said it believes that, "Congress intended § 111 to be used to establish emission limitations which are the lowest that can be achieved by that industry." (A-61) EPA recognizes absolutely no limitation based on cost except to state that, in its unreviewable discretion, it "would not" issue a standard requiring grossly disportionate costs. A standard so issued would not be set aside by the court below[5] unless the affected *industry* could

[3] According to a report submitted to EPA by an agency retained by it.

[4] The most distinguished economists in the world would disclaim the ability to reliably predict future interest rates, fuel costs or capital availability. How then, can an environmental agency, which confesses its inability to gauge the environmental benefit of its own regulations, perform an impossible economic evaluation?

[5] That court has exclusive jurisdiction; and a petition challenging a standard must be filed within 30 days after promulgation. (42 U.S.C. § 1857 h-5; A-112).

show inability to survive if it were required to comply.[6] It is this state of the law which gives EPA the power to require millions to be wasted to accomplish only small benefit to the environment.

No industry can ever prove its *inability* to bear the costs of pollution control.[7] As any high school economics student knows, increased costs (as imposed by too strict controls) will force weaker producers out of business. Their employees (or potential employees) will lose jobs, supply of the product will be reduced and prices will rise. A smaller industry consisting of fewer producers would survive and, perhaps thrive. Only the public interest would be hurt—by a decrease in national productivity, employment and standard of living.

This result is precisely what Congress intended to avoid when it designated *enhancement* of national productivity as a principal Clean Air Act purpose and directed the Agency to take cost into account in setting standards. (42 USC §1857(b), §1857c-6(a)(1); A-109; see Pet. 10-15) The national interest requires the intent of Congress to be restored by this Court.

THE MASS STANDARD

EPA amended the mass standard by removing the two hour averaging requirement without advance notice to permit public comment as required in the Clean Air Act. (Pet. 7)

[6] This result is reached by statutory construction which conflicts with this Court's decision in *U.S.* v. *Oregon*, 366 U.S. 643, 648 (1961); see also *Pipefitters* v. *U.S.* 385, 446 (1971), by judicial review which was inadequate under the requirements stated in *Overton Park, supra*, and in conflict with the decision in *Camp* v. *Pitts, supra*.

[7] Consider the utility industry. No matter what the costs might be, they would be passed to customers through rate increases. The industry would be able to "adjust" nicely.

Thus, that statute as well as the Administrative Procedure Act were violated. (42 USC § 1857c-6(b)(1)(B), A-111; 5 USC § 553(b), A-107) These actions occurred at a time when the court below held jurisdiction over the Petition contesting the standard so amended.

Petitioner protested this amendment promptly upon completion of remand. Nevertheless, the court below refused to deal with this question stating it "was not at issue on remand." (A-4) Thus, a regulation which was amended in flagrant violation of two statutes has been validated by default.

Respondent relies on that court decision to remove the issue from this proceeding, but does not advance any rationale or legal principle to support the action of the court below. Respondent also asserts that the *standard* cannot be violated by a momentary emission because a "test procedure" requires measurement over a longer period[8]. (R. Br.2) But a test procedure is not a standard. *Amoco Oil Co.* v. *EPA*, F2d 722, 743 (D.C. Cir., 1974) Such procedures can apparently be changed at will and without receiving public comment or the Agency supplying a reasonable explanation of the underlying rationale.

THE OPACITY STANDARD

Respondent insults the intelligence of this Court when it argues that a plume opacity standard is not an "irrebuttable presumption". A simple reading of the standard and the Act destroys this contention.

[8] Even the three hour period is inadequate for a standard of performance. EPA states, "since manual stack tests are only conducted for a relatively short period of time (e.g., one to three hours), they cannot be representative of all operating conditions." (40 Fed. Reg. 46241)

The standard states that no gasses shall be discharged which "exhibit greater than 20% opacity". (40 CFR 60.62 (a)(2); A-105) The Clean Air Act states it is unlawful for a source to be operated "in violation of an standard of performance applicable to such source". (42 USC § 1857 c-6(e); A-111) Therefore, emission of a plume which is more than 20% opaque unavoidably and automatically violates the law. This creates a conclusive presumption that the too-dense plume contains too much pollution.

Respondent's further comment that EPA might accept other evidence "as probative" that the source of a too opaque plume is not polluting shows that the Agency doesn't consider opacity to be reliable and also concedes that it might not enforce the law[9]. Obviously then, an opacity standard is neither necessary for, nor reliable in the enforcement of anti-pollution regulations.

Continuing his incredible assertions, the Solicitor General argues that perhaps there is a conclusive presumption but it should not apply to regulations concerning industry. (R.B. 13-14) This argument overlooks two points:

> —Selective application of the Fifth Amendment (applying it to protect some rights and denying its protection to others) would be disgusting, and
>
> —Opacity standards can be used to close plants, depriving workers of jobs and imposing higher prices on consumers. Thus, the application of the conclusive presumption doctrine here would serve the same purpose as protecting the rights of pregnant teachers and food stamp applicants.

Despite another Solicitor General's argument, neither EPA nor the court below actually *found* that opacity is a

[9] A court of law, however, is expected to enforce the law as written.

reliable measure of pollution. EPA conceded particle size, stack diameter and weather can produce different opacities in plumes containing the same volume of pollution. (A-90) The court below, in another *non*-finding, conditioned its comments referring to its *lack of expertise,* expressed its *inability* to find a basis to reject EPA's conclusions (which contradicted the results of its own factual findings) and alluded to the possibility that somehow future learning might support its conclusions.

By contrast, the U.S. Department of Commerce (parent agency of the U.S. Bureau of Standards) comments that "opacity limits have not been satisfactorily correlated" to mass emission volumes and recommends "that opacity limits not be adopted as a standard". (39 F.R. 37466, 37923) Characteristically, EPA, the court below and the Solicitor General *ignore* this authoritative recommendation.

The "small margin of error" referred to by the Solicitor General (Br. 14) is *40%* of the reading. This is *not* a *small* margin. (see Pet. 18, fn 63) Further, it is now time for judicial "interference" in the "the technical aspects of environmental control". (R.B. 14, fn. 11) EPA has had four years to support this standard.

Plume opacity is not in a "formative stage". It has been a legal standard in the U.S. since 1908. (see VII National Resources Lawyer 457 (1974)) The U.S. Bureau of Mines circular relating to its use specifically cautious against the use to which EPA is now putting this test. Recent empirical evidence (including that developed by EPA itself) uniformly proves this caution to be correct. This Court should now remove this controversial obstacle to sound environmental control by rejecting plume opacity standards as "not precise enough to provide good emission control or reliable enforcement" as recommended by the American Society for Testing and Materials. (Pet. 18)

Finally, the Solicitor General argues opacity standards are "crucial" to any regulatory scheme. (R.B. 15) Even his client, EPA, does not agree with this. EPA states that it *can* enforce its emission standards even "when opacity standards may not be violated." (39 Fed. Reg. 9309) Thus, opacity standards are *not* necessary for enforcement.

DISCRIMINATION

It is irresponsible, fatuous and wrong for the Solicitor General to tell this Court that the difference between the cement and power plant standards was not proved "unreasonable". It is unreasonable to curb sources of *less* pollution (cement plants) more severely than sources which emit a greater volume of the same pollutant (power plants). The purpose of the Act is to reduce total pollution. Oppressive restriction of sources of lesser pollutant volume may support the Agency's image as a "tough regulator", but it will *not* reduce total pollution very much.

The principle of reducing pollution by controlling sources of the greatest volume of pollutants is universally recognized—except in this case:

> —EPA, itself, supports its regulation of asphalt concrete plant emissions *on the basis* that the industry is a *major source* of pollution. (APTD-1352c, Vol. III, p. 109 (EPA, 1974))
>
> —EPA's implementation plan regulations and those of 32 states impose *identical* restrictions on all process industries. (APTD-1334, Table III (EPA, 1972), BNA Envir. Rptr., St. Air Laws, p. 301 *Et Seq.*)
>
> —The Court below has suggested that recycle acid plants might be relieved of all control because they emit only about 2% of total sulphur dioxide pollution. *Essex Chemical Co.* v. *EPA.*, 486 F2d 427, 439 (D.C. Cir., 1973)

> —A senate committee currently proposes to relieve manufacturers of fewer automobiles from stricter controls applying to manufacturers of more vehicles. *Wall Street Journal* 11-25-75, p. 7. What a parody if moving sources of less pollution were subject to less control and the *opposite* policy applied to stationary sources!

Respondent's contention simply cannot withstand rational analysis.

Contrary to Respondent's assertion, the court below did *not* find EPA's "factual explanation" of the differences between the standards to be "reasonable". (R.B. 11) The court said, "Proof of unreasonableness in the diversity of the standards referred to is lacking". (A-3) This is *not* a positive finding of reasonableness. The statement is also wrong.

Precipitators and baghouses *can* control particulate emissions from cement and power plants to the same degree. Manufacturers of these devices confirm this conclusion stating that the control technology is identical and the equipment is similar (with only minor variations in materials and sizes). Their statements are in the record. And the court below indicated (in its earlier decision) that the efficiency of control devices applied in one industry can be used to show their capability to control emissions of other sources. (A-32) EPA agrees, stating:

> It now appears that precipitator technology may achieve [in power plants and incinerators] the same levels of control . . . required of the Portland Cement Industry and that baghouses can be applied to the other industries." (A-63)

This statement identifies a case of classic statutory discrimination. There is no reason for the difference—and the result of the difference runs counter to the statutory purpose. Without controls, power plants would emit at least 2½ *times* the volume of particulates that cement plants

would.[10] After applying the current standards, power plants would emit *10 times* as much. This is not rational pollution control.

Apparently the court below sensed this improper result. Otherwise there would have been no reason for it to contemplate that the differences between the standards might be reduced in the future. (A-3) But this expectation cannot support the continuing validity of a discriminatory regulation. The regulation has been in effect with the force of law for four years. EPA could have removed the discrimination at any time. Its statement that it will "consider" this matter (A-63) is simply *not* an adequate substitute for the due process of law.

CONCLUSION

The cement standards must be vacated by this Court. EPA has full authority and power under the Clean Air Act to issue, in accordance with proper legal procedures, new standards which reflect meaningful consideration of economic cost, reliably measure pollution and do not discriminate in a manner contrary to the statutory purpose.

Respectfully submitted,

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[10] The Economics of Clean Air, (G.P.O. 1971) pp. 4-4, 4-8, 4-18, 4-35.